

IN THE SUPREME COURT OF THE STATE OF MONTANA

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Case No. DA 10-0205  
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**MICHELLE KULSTAD,**

Plaintiff and Appellee,

v.

**BARBARA L. MANIACI,**

Defendant and Appellant.  
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On Appeal from the Montana  
Fourth Judicial District Court  
Missoula County  
before the Honorable Edward P. McLean  
Cause No. DR-07-034  
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**RESPONSE BRIEF OF APPELLEE**  
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## **I. STATEMENT OF THE ISSUES**

1. Whether there is substantial evidence to support the District Court's findings of fact and conclusions of law supporting the final parenting plan in this matter?
2. Whether Appellant Maniaci properly preserved for appeal her constitutional claims that the final parenting plan compromises her right to travel and the claims of violation of due process?
3. Whether the District Court erred in maintaining the confidentiality of the notes taken by the minor children's psychotherapist?

## **II. STATEMENT OF THE CASE**

In its precedent-setting decision, this Court affirmed the parental rights of Michelle Kulstad, a same-sex parent of L.M. and A.M. The matter was sent back to the District Court for the determination of a final parenting plan.<sup>1</sup> A hearing was held on March 2 and 4, 2010, on the final parenting plan. Kulstad was

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<sup>1</sup> Kulstad v. Maniaci, 2009 MT 326, 220 P.3d 595, 325 Mont. 513.

present at this hearing with her counsel, but Barbara Maniaci did not appear at the hearing, having left the children and moved to Tennessee at the end of November, 2009. Counsel for Maniaci represented, however, that they had authority to go forward with the hearing without Maniaci being present. After the hearing, the District Court issued *Findings of Fact and Conclusions of Law and Order re: Parenting*. D.C. Doc. 517. It is from this parenting plan that Maniaci now appeals.

Also on appeal is a separate order from the District Court denying Maniaci access to the notes of the children's psychotherapist, Dr. Paul Silverman. That issue was initially brought to this Court after the District Court granted a *Temporary Protective Order* at the request of the children's Guardian Ad Litem. D.C. Doc. 397 (GAL's Report); Doc. 398 (Temporary Protective Order (TPO)). Maniaci sought review of the TPO on a *Petition for Writ of Supervisory Control*, after which this Court ordered that issue remanded to the District Court for further arguments on statutory

and constitutional lawfulness of the *TPO. Order, Maniaci v. Montana Fourth Judicial District Court*, Cause No. OP 09-0127, at 5. After that Order, a hearing was held on July 9, 2009, and the Court subsequently issued an *Opinion and Order*, denying the parties access to the children's psychotherapy notes. D.C. Doc. 452.

Maniaci now appeals from those two orders - the order on the final parenting plan and the order denying the parties access to the psychotherapy notes of the children's psychotherapist.

### **III. STATEMENT OF THE FACTS**

#### **A. Statement of the Facts Regarding the Final Parenting Plan.**

Following the District Court's *Findings of Fact, Conclusions of Law and Order*, dated September 29, 2008, and upheld in an opinion issued October 6, 2009, the parties co-parented the minor children, L.M. and A.M., under the terms of the Interim Parenting Plan the

District Court set forth in its Conclusion of Law No. 29. D.C. Doc. 368 at 37.

On November 27, 2009, Kulstad began parenting the minor children for an agreed upon 3 week period, during which time, Maniaci was travelling to Tennessee. Maniaci notified the G.A.L. that she was going to visit family in Tennessee for about 3 weeks and would return on December 17, 2009. On December 7, 2009, Maniaci's attorney notified the G.A.L. that Maniaci was moving to Tennessee on a permanent basis. Ex. B, 03/02/10 & 03/04/10 Hr'ing. On December 8, 2009, Maniaci's attorney emailed Kulstad's counsel and the PACT team members that Maniaci would not be returning from Tennessee as planned and that her return date was uncertain. *Id.* at Exs. Q & R. As of the date of the parenting plan hearing on March 2 and 4, 2010, Maniaci had not seen the children since November 27, 2009.

The professionals involved in this matter expressed serious concerns about the negative effect of Maniaci's move to Tennessee on the minor children, especially

given their diagnosed attachment disorders. Dr. Silverman testified that Maniaci's decision to leave the children and move to Tennessee aggravated the children's attachment difficulties. 03/02/10 & 03/04/10 Hr'ing Tr. at 557: 16-21. Jennifer Walrod, Maniaci's therapist, testified that Maniaci's disappearance from the children's lives for a period of months could cause them to experience a profound grief experience. *Id.* at 253: 21-24, 254: 1. Jo Antonioli, G.A.L., explained that Maniaci's choice to remain in Tennessee "precipitate[d] harm to the children by its very nature, that one parent will have long periods of separation from the children." *Id.* at 60: 3-7.

Between the bench trial in May, 2008, and the parenting plan hearing in March, 2010, Maniaci or persons acting on her behalf filed 7 unsubstantiated complaints against Kulstad with the Department of Public Health and Human Services Child and Family Services Division ("CFSD"). *Id.* at 118: 13-15. CFSD investigated all of these complaints and utilized the

services of a forensic interviewer provided by First Step at St. Patrick Hospital *Id.* at 150: 12-24, 151: 1-24. None of these reports were substantiated.

Cherrill Rolfe, CFSD Investigator, stated that she had concerns that the children were being coached by Maniaci. *Id.* at 518: 21-24, 519: 1-2. Ms. Rolfe's supervisor, Nikki Grossberg, stated that CFSD had concerns about the detrimental effects on the children as a result of the continuous interviews and investigations that were necessitated by these unsubstantiated reports against Kulstad. *Id.* at 122: 11-20. Ms. Antonioli stated that during her two years of involvement in this matter, she had concerns about Maniaci coaching and psychologically abusing L.M. and A.M. *Id.* at 64: 12-24, 65: 1-5. Cindy Miller, Ph.D., parenting plan evaluator, made findings in her February 28, 2008, Parenting Plan Evaluation that demonstrated her concern that Maniaci was indoctrinating the children against Kulstad. She also testified to this at the parenting plan hearing. 03/02/10 & 03/04/10

Hearing at Ex. F; 03/02/10 & 03/04/10 Hr'ing Tr. at 387: 18-24, 388: 1-24, 389: 1-24, 390: 1-24, 391: 1-18.

CFSD authored a letter to Ms. Antonioli, signed by Cherrill Rolfe and Nikki Grossberg, and requested that a meeting take place with the parties and their respective counsel. Maniaci never responded to this request, and the meeting was never scheduled *Id.* at 135: 15-24, 136: 1-5. In the same letter, CFSD expressed concerns that Maniaci was psychologically abusing the children. Ex. M, 03/02/10 & 03/04/10 Hr'ing.

The G.A.L. requested that both parties submit their proposed parenting plans by November 30, 2009. D.C. Doc. 457 at 1. After receiving them, the G.A.L. filed her *Guardian Ad Litem's Recommended Final Parenting Plan*, dated January 22, 2010. D.C. Doc. 485.3. At the same time, the PACT Program finalized its recommendations and filed its *PACT Program Final Report*, dated January 22, 2010. Ex. O, 03/02/10 & 03/04/10 Hr'ing.

The parenting plan hearing was held on March 2 and 4, 2010. Maniaci did not personally appear, nor did she testify. Her attorney assured the District Court that she had the authority to proceed on Maniaci's behalf. 03/02/10 & 03/04/10 Hearing Tr. at 158: 11-24, 159: 1-10.

Maniaci presented the testimony of Jo Antonioli, G.A.L.; Nikki Grossberg, CFSD supervisor; Dr. Daniel Harper, pediatrician; Jennifer Walrod, Maniaci's therapist; Evy O'Leary Bennett, counselor; and Cindy Miller, Ph.D. The District Court found that "[to] say that Ms. O'Leary-Bennett's credibility was strained is being generous." D.C. Doc. 517 at 37. It also found that the testimony of Dr. Harper and Ms. Walrod was based solely on information obtained from Maniaci. The District Court found "that the witnesses for [Maniaci] suffer from credibility problems as they were very limited in the scope of information that they received. The source of information was limited to either

[Maniaci], or the children, who were coached by her."

*Id.* at 35.

Kulstad presented the testimony of Dr. Miller; Paul Silverman, Ph.D, the minor children's psychotherapist; Cherrill Rolfe, CFSD Investigator; Ms. Antonioli; and Kulstad. The District Court indicated that it relied heavily on the testimony of Dr. Miller and on her Parenting Plan Evaluation, dated February 28, 2008. *Id.* at 31.

Dr. Miller also testified in detail as to the bases for the conclusions and recommendations reached in the *PACT Program Final Report*. Ex. O, 03/02/10 & 03/04/10 Hr'ing; 03/02/10 & 03/04/10 Hr'ing Tr. at 408-431; See Appendix.

The G.A.L., Dr. Miller, Dr. Silverman, and Cherrill Rolfe, of CFSD, all testified that they had concerns about whether Maniaci would ever allow the children to return to Montana, if Maniaci was allowed to parent the minor children in Tennessee. Ms. Antonioli testified that based on her years of experience as a family law

attorney that there are emergency provisions, which would allow the State of Tennessee to intervene in this matter. This is particularly worrisome, as Tennessee would not understand the history of this case like Montana does. *Id.* at 601: 7-23. Dr. Miller testified that Maniaci believed that Kulstad was the cause of all of her and children's problems, and this belief led to the "position of being absolute that the children should not have any contact with Ms. Kulstad, whatsoever, and being very clear that she would do whatever was in her power to try to ensure that there would be no contact." *Id.* at 387: 2-17. Dr. Miller also explained that due to Maniaci's distorted view of her world, she equates the Court order to share parenting with Kulstad as "losing the children." *Id.* at 393: 4-8. Dr. Silverman explained that his concern is based on a conversation he had with Maniaci and her husband, Larry Groth, where they expressed the belief that Kulstad would kill the children. Silverman stated that it is reasonable to expect that if Maniaci felt

that strongly, then she would not want Kulstad to be able to contact the children and would violate the law to prevent the children from having contact with Kulstad. *Id.* at 562: 16-24, 563: 1-8, 571: 20-24, 572: 1-7.<sup>2</sup>

Ms. Walrod, Maniaci's therapist, testified as to her impressions of Maniaci's views of the Court's prior ruling and Kulstad's role as a parent. Ms. Walrod testified that "...when it comes to her belief that the children are not safe with [Kulstad], then, yeah, [Maniaci] feels strongly about that, and will not vacate that position." Furthermore, Ms. Walrod explained that Maniaci "...cannot believe, that [Kulstad] has an authentic, nurturing, caring, protective relationship with the children." *Id.* at 192: 7-15, 218: 18-24. Ms. Walrod further testified that Maniaci "feels she has lost her children," that she has been wronged by the Court and CFSD, and that she has given up. *Id.* at 234: 5-15, 235: 13-24, 236: 1-18, 214: 5-13.

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<sup>2</sup>After the parenting plan hearing, Dr. Silverman wrote a letter to the District Court, in which he sought to clarify his testimony. Appendix Ex. 24 App. Brf.

Having considered the evidence and testimony provided at the parenting plan hearing, the District Court found and concluded that adopting the *PACT Program Final Report* and the *Guardian Ad Litem's Recommended Final Parenting Plan* were in the best interests of the minor children. The District Court also made the following Conclusions of Law:

- a. "Dr. Maniaci's decision to leave the children with [Kulstad] while she travelled to Tennessee completely undermines her stated concerns about [Kulstad's] ability to parent the children." D.C. Doc. 517 at 38.
- b. "[Maniaci's] decision to leave the children with [Kulstad] while she travelled to Tennessee causes this Court to disbelieve the reports to CFSD, and the Court, therefore, concludes that such reports are not true." *Id.* at 38.

- c. "The Court shares the concern that such reporting may be psychologically abusive to the children." *Id.* at 38.
- d. "The fact that [Maniaci] continues to indoctrinate the children against [Kulstad], and to coach them to make untrue statements about [Kulstad], is clearly harmful to the children and not in their best interests." *Id.* at 38.
- e. "It is not in the best interest of the children to be allowed to travel outside of the state of Montana with Barbara Maniaci or Larry Groth." *Id.* at 38.
- f. "The Court approves the *Guardian Ad Litem's Recommended Final Parenting Plan*, dated January 22, 2010." *Id.* at 39.
- g. "The Court approves the Final Report of the PACT Program, dated January 22, 2010." *Id.* at 39.

Many of these conclusions were foreshadowed in the District Court's September 29, 2008, *Findings of Fact, Conclusions of Law and Order*. D.C. Doc. 368. Evidence and testimony that Maniaci was attempting to coach or indoctrinate the minor children against Kulstad was presented at the bench trial in May, 2008. In its September 29, 2008, Order, the District Court concluded the following, which was upheld on appeal:

- a. "... the Court finds both children have significant attachment issues. However, the children have a strong attachment to both Ms. Maniaci and Ms. Kulstad. Significant strains have already been placed on the children's relationship with Ms. Kulstad, ...". D.C. Doc. 368 at 10.
- b. "It is not in the best interest of the children for Ms. Maniaci to continue to indoctrinate them against Ms. Kulstad." *Id.* at 12.

c."... it would be in the children's best interest to significantly reduce Ms. Maniaci's parenting time if she is unable or unwilling to cease indoctrinating the children against Ms. Kulstad." *Id.* at 12.

Maniaci did not raise the issue of a Constitutional Right to Travel in any filed document or at the parenting plan hearing. No direct evidence was presented at trial concerning Maniaci's financial status or her reasons for moving to Tennessee. Maniaci did not file Proposed Findings of Fact and Conclusions of Law. Maniaci did not appear at the hearing on the Final Parenting Plan, nor did she testify by deposition. 03/02/10 & 03/04/10 Hr'ing Tr. at 158: 11-24, 159: 1-10.

Maniaci did not specify a single Finding of Fact or Conclusion of Law made by the District Court that she believes is "clearly erroneous."<sup>3</sup>

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<sup>3</sup>At pages 10, 28 and 30 of her Opening Brief, Maniaci makes a passing reference to Findings of Fact 16, 17, 18 and 20.

**B. Statement of Facts Regarding Access to the Notes of  
the Children's Psychotherapist**

The issue regarding Maniaci's attempts to access the psychotherapy notes of the children arose initially when this matter was on appeal to this Court.

During the pendency of this first appeal, the G.A.L. for the children sought a temporary protective order from the District Court to protect the notes of the children's psychotherapist, Dr. Silverman, from access by the attorney for Maniaci.

Dr. Silverman had initially provided his notes to Maniaci and her attorney in order to try to improve his relationship with Maniaci and foster communication with her regarding the children's therapy. 7/9/09 Hr'ing Tr. at 20.

The District Court found, and Maniaci does not contest in her brief, that "things ran smoothly for some time until Defendant Maniaci and her attorney, Linda Osorio-St. Peter, began making demands and requests for information that were, in the opinion of

Dr. Silverman, contrary to the best interests of the children." D.C. Doc 452 at 3.

The G.A.L. in her request for the temporary protective order provided the Court with two letters that detailed the demands and inquiries made of Dr. Silverman by Maniaci's attorney upon her review of the therapy notes that had been provided. For example, Ms. Osorio-St. Peter, in a letter dated January 8, 2009, accuses Dr. Silverman of providing incomplete therapy notes and not providing her with videos of the children during therapy. Ex. B, attached to D.C. Doc. 397. In that letter, Ms. Osorio-St. Peter asks Dr. Silverman if he exchanges emails with Kulstad, and if so, "why are they not in the session notes, and why have you not provided us copies of them?" *Id.* at 3. In inquiring about a particular reference in Dr. Silverman's notes regarding transfer of the children from Maniaci to Kulstad, Ms. Osorio-St. Peter states:

In your session note of September 18, 2008, you make a note that says: ' T had learned from M and from the GAL that the children were not transferred to M as usual by B . . .' When did

you learn this from Michelle? When did you learn this from the GAL? There are no notes of either of these conversations.

Id. at 3. Ms. Osorio-St. Peter was demanding that Dr. Silverman explain himself and his note-taking procedures to her, while insinuating that certain notes were being intentionally withheld from her examination. Notably, these requests involve Dr. Silverman's interaction and communication with Kulstad - not questions regarding how best to facilitate the children's therapy.

Ms. Osorio-St. Peter followed up the letter of January 8, 2009, with a letter on January 14, 2009, that Dr. Silverman found even more troubling. Ex. C, attached to D.C. Doc. 397. In that letter, Ms. Osorio St. Peter threatens Dr. Silverman with contempt of court if he does not provide certain videotapes she believed he had. The letter demands that he produce the videos within the next ten days or explain why he was refusing to do so. If he did not do so, Ms. Orsorio St. Peter states, "On or about January 24, 2009, I will

bring a motion for an Order to Show Cause why you should not be held in contempt. I will request that you pay attorney fees and costs to bring the motion. .  
." *Id.*

It was this threat of bringing a contempt of court action against Dr. Silverman that prompted the G.A.L.'s request for a *Temporary Protective Order (TPO)* for Dr. Silverman's notes. D.C. Doc. 397.

In support of the request for the *TPO*, the G.A.L. attached a letter from Dr. Cindy Miller, who was coordinating the children's therapy. Dr. Miller reminded the parties that the purpose of the PACT Program was to try to promote cooperative co-parenting during the divorce process rather than use resources for the "adversarial process which entrenches parents against each other to prove who is more unfit." Ex. A attached to D.C. Doc. 397.

Dr. Miller noted that "providing copies of therapeutic notes to attorneys who attempt to utilize the notes to further their adversarial goals is

directly in conflict with the PACT objective and the children's best interest." *Id.* Dr. Miller therefore asked the GAL to make the request to the Court that therapeutic notes and products will no longer be made available to parents and attorneys in this case." *Id.*

A hearing was held on July 9, 2009, on the issue of access to the psychotherapy notes. At this hearing, Dr. Silverman testified unequivocally that he believed that effective therapy required confidentiality and protection of the children's privacy interests. Dr. Silverman stated that the children need to know therapy is confidential, and that "they have the privacy they need in order to behave freely, and to say things that they want, ...." 7/9/09 Hr'ing Tr. at 16. He stated that therapy cannot be done without the children understanding that there are no consequences to what they say and do. *Id.* at 18-19. He was concerned that the therapy notes were simply being used to encourage litigation and hostility between the caregivers. *Id.* at 23.

Dr. Silverman noted that the general practice was not to provide such notes, but rather to maintain the confidence and the privacy between the child and the therapist. *Id.* at 24. He believed he would not be able to provide effective therapy if the notes were provided, because the children could suffer the consequence of being told "how to behave, and what to say in therapy, or, perhaps, even what not to do, and what not to say." *Id.* at 26. He was concerned the children would be exposed to increased anger and irritability by Maniaci and that the notes would contribute to the animosity between the parties. *Id.* at 26-27.

Dr. Silverman confirmed that "one of the key modes of therapy is to allow children to do and say what they want without being monitored by a parent." 7/9/09 Hr'ing at 73. The children would necessarily give opinions and make statements that could lead to negative consequences at home. *Id.* at 77. Dr. Silverman recognized that the notes were "primarily

requested for Dr. Maniaci's benefit," and "there were no requests to consult about what had occurred in psychotherapy, or discuss the children's wellbeing." *Id.* at 79.

Dr. Miller confirmed that children need to know that therapy is a "safe place." 7/9/09 Hr'ing Tr. at 103. She testified that releasing the notes jeopardized the objectives of the PACT program to promote cooperative co-parenting, get away from the adversarial process, and focus parents on therapeutic issues. Dr. Miller stated that the therapy notes should not be provided, because "there is a risk to the children, that it can completely compromise the therapy, so that therapy is no longer effective." *Id.* at 105. For therapy to be effective, the children have to establish a trusting relationship with the therapist, and if notes are provided to the parent, then it creates the risk of compromising therapy as a "safe place," where the children are "free to really

explore what their views are, their beliefs, and their perceptions, apart from their parents." *Id.* at 107.

The District Court, upon hearing this testimony, continued the protective order for the children's therapy notes. D.C. Doc. 452. In its *Opinion and Order*, the Court firmly chastised Maniaci and her attorney for their actions and statements against the G.A.L. in criticizing her when she brought the petition for a temporary protective order. The Court notes that the pleadings indicated that Maniaci believed the G.A.L. an advocate for Kulstad. In response to such allegations, the Court stated:

In fact, the Court finds Ms. Maniaci's actions serve only to exacerbate the difficulties facing the children in this matter, as well as those of the Guardian Ad Litem. In her memorandum, Ms. Maniaci states that Dr. Silverman discontinued furnishing her with the notes, but continued to supply them to Ms. Kulstad. This, however, is not only inaccurate, it is a total fabrication. Ms. Maniaci and her attorney continue to receive reports and notes from Dr. Silverman after Ms. Kulstad no longer received such. Defendant's attorney, in the Court's opinion, intentionally misstates the facts. D.C. Doc. 452 at 5.

The District Court was clearly upset that Maniaci and her attorney were not only exacerbating the difficulties facing the children, but also making blatant misstatements of facts to the court.

The District Court then went on to analyze release of the therapist's notes in light of the children's right of privacy under Article II, Section 10 of the Montana Constitution. The Court noted the broad right of privacy in Montana and held that their right of privacy must be considered paramount and that the therapy notes consist of confidential information given to Dr. Silverman by the children with the expectation and necessity of confidentiality. D.C. Doc. 452 at 9-12.

Notably, Maniaci in her initial brief makes no argument concerning the District Court's reliance upon the children's constitutional right of privacy in protecting the therapy notes.

#### IV. STANDARD OF REVIEW

The standard of review as to findings of fact is to determine whether they are clearly erroneous. In In re the Marriage of Robison, this Court stated:

We review a district court's findings regarding custody to determine whether those findings are clearly erroneous. *Pankratz v. Teske*, 2002 MT 112, ¶8, 309 Mont. 499, ¶8, 48 P.3d 30, ¶8 (citing *In re Custody of Arneson-Nelson*, 2001 MT 242, ¶15, 307 Mont. 60, ¶15, 36 P.3d 874, ¶15.) Findings are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or this Court's review of the record convinces it that a mistake has been made. *Pankratz*, ¶8. We will reverse a district court's decision relating to custody only where an abuse of discretion is clearly demonstrated. *Pankratz*, ¶8. See also *In re Marriage of McKenna*, 2000 MT 58, ¶14, 299 Mont. 13, ¶14, 996 P.2d 386, ¶14; *in re Marriage of Baer*, 1998 MT 29, ¶18, 287 Mont. 322, ¶18, 954 P.3d 1125, ¶18. The test for abuse of discretion is whether the district court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re Marriage of Robison*, 2002 MT 207, ¶15, 311 Mont. 246, ¶15, 53 P.3d 1279, ¶15.

The standard of review for conclusions of law is set out in *In Re the Marriage of Gochanour*, 2000 MT 156, ¶16, 300 Mont. 155, ¶16, 4 P.3d 643, ¶16, "the

standard of review of a district court's conclusions of law is whether the conclusions are correct. See Scott v. Scott (1997), 283 Mont. 169, 173, 939 P.2d 998, 1000 (citations omitted.)"

## **V. SUMMARY OF THE ARGUMENT**

A. The parenting plan recommended by the PACT Program and approved by the District Court is in the best interests of L.M. and A.M. for the following reasons:

1. Maniaci abandoned L.M. and A.M.
2. Maniaci has continued to coach the children.
3. Maniaci refuses to accept Kulstad's status as a parent.
4. Maniaci failed to obtain the counseling required by the District Court.
5. Maniaci has continued to make unsubstantiated complaints against Kulstad.

B. Evidence of the Constitutional right to travel was not offered at trial. Neither was the argument

ever presented to the District Court. Regardless, the best interests of the children take priority over a parent's individual right to travel.

- C. Maniaci voluntarily chose not to be heard.
- D. The District Court properly continued the Protective Order, denying Maniaci and her attorney access to the children's psychotherapy notes.

## **VI. ARGUMENT**

- A. The parenting plan recommended by the PACT Program and approved by the District Court is in the best interests of L.M. and A.M.**

Maniaci attempts to cast the facts and the argument in terms most favorable to her. However, in her effort to do so, she does violence to the truth. From the beginning of this case, Maniaci has attempted first to demonize Kulstad and then the District Court. She has tried to shift the focus from the best interests of the children to her own selfish desires. For Maniaci, this case has never been about the children's best

interests. The District Court, on the other hand, has never lost sight of the best interests of the children.<sup>4</sup>

Here, the following facts are not in dispute:

- Prior to this Court's landmark decision in Kulstad v. Maniaci, 2009 MT 326, 220 P.3d 595, 325 Mont. 513, Maniaci denied Kulstad's role as a parent of L.M. and A.M.
- Both children have significant attachment issues.
- In November, 2009, Maniaci notified the G.A.L. that she was going to visit family in Tennessee for about 3 weeks and would return on December 17<sup>th</sup>. She told her counselor that she needed "a little vacation." 03/02/10 & 03/04/10 Hr'ing Tr. at 193: 19-24.
- On December 7, 2009, Maniaci notified the G.A.L. that the move was permanent.

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<sup>4</sup> Perhaps this explains Maniaci's clear desire to disqualify Hon. Ed McLean. D. C. Doc. 407.

- Maniaci's disappearance from the children's lives for a period of months could cause them to experience a profound grief experience.
- Maniaci cannot believe that Kulstad has an authentic, nurturing, caring, protective relationship with the children.
- Maniaci equates the Court order to share parenting with Kulstad to "losing the children." *Id.* at 393: 4-8.
- Maniaci continues to indoctrinate the children against Kulstad, and to coach them to make untrue statements about Kulstad.

While she doubtless disputes the following, it is nonetheless evident: Maniaci's most recent claims to this Court set forth in her Opening Brief continue to highlight her misguided view of the District Court's prior findings as well as the foregoing facts. Maniaci states within the Statement of the Case, "Defendant Barbara Maniaci appeals from...a subsequent order issued April 1, 2010, adopting a Final Parenting Plan

which **terminates her custody** of her children..."

Statement of the Case, App. Brf at 2. In Maniaci's discussion of her right to travel, she states, "Kulstad was awarded a parental interest in **Maniaci's children**." The same paragraph goes on to include, "The district court's current decision **strips Maniaci of her custodial rights** and places sole custody in the **nonparent**." Lastly, she asserts, "The final parenting plan effectively **terminated Maniaci's parental rights**." [emphases supplied] *Id.* at 20-21.

Rather than to address the facts, Maniaci attempts to make the argument that the Court terminated her parental rights, because she was psychologically abusing the children. While it may be true that the effect of her making unsubstantiated reports to CFSD has the effect of psychologically abusing the children, that was only one of many concerns testified to by Dr. Cindy Miller, the G.A.L., representatives of CFSD, Dr. Paul Silverman, and her own therapist, Jennifer Walrod. Even more basic, the District Court did not terminate

her parental rights. D.C. Doc. 517. Based upon the foregoing, it is clear that the District Court had numerous bases for finding that it is in the best interests of the minor children to reside primarily with Kulstad, while leaving open the possibility of Maniaci returning to Montana and taking a more positive role as a co-parent.

It is significant that in her Opening Brief, Maniaci does not directly challenge a single Finding of Fact entered by the District Court. Based upon Maniaci's failure to challenge specific findings, this Court should determine that they are correct.

**B.Evidence of the constitutional right to travel was not offered at trial. Neither was the argument ever presented to the District Court. Regardless, the best interests of the children take priority over a parent's individual right to travel.**

Appellant argues that the District Court's Final Parenting Plan violates Maniaci's constitutional right to travel, citing Guffin 2009 MT 169, 350 Mont. 489, 209 P.3d 225. Kulstad will demonstrate that Guffin is distinguishable from the facts of this case *infra*.

However, even more basic is the principle that new arguments may not be presented for the first time on appeal.

In In the Matter of T.E., M.E. and M.E., this Court stated:

This Court has consistently held that it will not consider issues raised for the first time on appeal. In re D.H., 2001 MT 200, ¶41, 306 Mont. 278, ¶41, 33 P.3d 616, ¶41...'As a general rule, we do not consider an issue presented for the first time on appeal because it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.' In re D.H., ¶41. In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court. State v. Benson, 1999 MT 324, ¶19, 297 Mont. 321, ¶19, 992 P.2d 831, ¶19. In the Matter of T.E., M.E. and M.E., 2002 MT 195, ¶20, 311 Mont. 148, ¶20, 54 P.3d 38, ¶20.

The record and the Transcript on Appeal reveal that at no time was evidence presented in support of the claim that Maniaci's constitutional right to travel was violated. Maniaci never testified. It is significant to note that Maniaci neither filed nor served upon counsel for Kulstad Proposed Findings of Fact and Conclusions

of Law which ordinarily would have included a constitutional argument. No Motion for Summary Judgment was ever presented to Judge McLean. Here, in her Opening Brief, for the first time, Maniaci presents this claim. Thus, this Court must conclude that Maniaci never even offered the District Court a conclusion that the recommended parenting plan violated a constitutional right.

In Guffin I, Mother prevailed in this Court because the District Court based its decision solely on Mother's decision to move: "The express reason for the District Court's decision to change the parenting plan to make Thomas the primary custodial parent was [Mother's] 'decision to move 700 miles across the state...'" In re Marriage of Guffin, 2009 MT 169, ¶8, 350 Mont. 489, ¶8, 209 P.3d 225, ¶8. The Guffins' original parenting plan designated Mother as the children's primary parent. *Id.* at ¶4. The District Court's Order Amending the Original Parenting Plan found both parents fit to care for the children. *Id.*

at ¶8. The District Court further found that Mother had "legitimate reasons" for moving back to Kalispell, including extended family and job opportunities. *Id.* In spite of all of these justifications, and without addressing the best interests of the children, the District Court ignored Mother's constitutionally protected right to travel and penalized Mother solely upon her decision to return to Kalispell, stating in its Conclusions of Law, "[I]t is this Court's opinion that the parent affecting the other parent's relationship with the children should be the one who pays the price of reduced parental contact." *Id.*

However, a parent's right to travel within the context of a parenting case is not unqualified, as Maniaci would have this Court believe. As the Court states at the end of Guffin I, "Any decision as to the custody of the children must be based upon a careful examination of what is in their best interests." *Id.* at ¶12 (citing In the Marriage of Robison, 2002 MT 207, ¶20, 311 Mont. 246, ¶20, 53 P.3d 1279, ¶20).

In In re Marriage of Robison, (citing In re the Marriage of Cole (1986), 224 Mont. 207, 729 P.3d 1276) this Court stated:

As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest. We believe that furtherance of the best interests of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate. We caution, however, that any interference with this fundamental right must be made cautiously, and may only be made in furtherance of the best interests of the child. In re Marriage of Robinson, 2002 MT. 207, ¶20, 311 Mont. 246, ¶20, 53 P.3d 1279, ¶20.

The Robison opinion goes on to state, "...[W]e hold that the District Court was correct in concluding that the best interests of the children outweighed [Mother's] fundamental right to travel" *Id.* at ¶30. Maniaci would like this Court to place her right to travel before the best interests of her children.

**C. Maniaci voluntarily chose not to be heard.**

Maniaci claims that the District Court's Order denies her Constitutional right to due process. She

bases this argument on the claim that ultimately the Court, the G.A.L. and the PACT Program ". . . relied on a determination made by CFSD that Maniaci was psychologically abusing her children." App. Brf at 23. She further maintains that this determination was made without notice or an opportunity to be heard.

However, the letter from CFSD, hearing Exhibit M, states: "CFSD would like to schedule a meeting with Ms. Maniaci . . . The meeting [would be] to discuss the fact that all these reports to CFSD concerning the abuse of the Maniaci children have been unsubstantiated and to discuss the negative effects that the constant interviews of the children may be having on them." The letter goes on to state, "Because of these latest unfounded reports, called to the Department concerning Michelle's care of the children, CFSD has more concerns that these children are exposed to psychological abuse by Barbara Maniaci." Ex. M, 03/02/10 & 03/04/10 Hr'ing. Maniaci never responded to the letter. 03/02/10 & 03/04/10 Hr'ing Tr. at 135: 15-42, 136: 1-5.

Maniaci concludes, "The GAL, PACT, and the District Court, in turn, used the decision of CFSD to deprive Maniaci of custody of her children." App. Brf at 30. It is beyond credulity that Maniaci can complain that she had no opportunity to be heard when she failed even to attend the parenting hearing or to testify by telephone.

In fact, the District Court concluded, "The Court shares the concern that such reporting *may be* psychologically abusive to the children." Emphasis supplied. [emphasis supplied] D.C. Doc. 517.

Significantly, but not mentioned by Appellant in her Opening Brief, the District Court also reached several other conclusions:

"1. Dr. Maniaci's decision to leave the children with Michelle while she travelled to Tennessee completely undermines her stated concerns about Michelle's ability to parent the children. *Id.* at 38.

2. Dr. Maniaci's decision to leave the children with Michelle while she travelled to Tennessee causes this Court to disbelieve the reports to CFSD, and the Court, therefore, concludes that such reports are not true. *Id.* at 38.
3. It appears that all of the reports to CFSD in 2008, 2009, and 2010 originated with Dr. Maniaci or persons acting on her behalf. *Id.* at 38.
5. The fact that Dr. Maniaci continues to indoctrinate the children against Michelle, and to coach them to make untrue statements about Michelle, is clearly harmful to the children and not in their best interests. *Id.* at 38.
6. It is not in the best interest of the children to be allowed to travel outside of the state of Montana with Barbara Maniaci or Larry Groth." *Id.* at 38.

Thus, it is clear that the District Court had many bases upon which to conclude that the best interests of

the children were served by the Final Parenting Plan which it adopted.

Appellant appears to create a "straw man" by raising a Constitutional argument which is clearly not supported by the record. She would have this Court believe that the District Court relied entirely upon a single claimed CFSD "determination" which, in fact, was only one of many expressed concerns.

**D. The District Court properly continued the protective order, denying Maniaci and her attorney access to the children's psychotherapy notes.**

Maniaci asserts on appeal that the District Court erred in continuing the protective order. Maniaci claims that the trial court erred in its reliance upon In re Berg, 886 A.2d 980 (2005), involving a fact situation very similar to the case at bar. There the New Hampshire Supreme Court noted that parental rights are not absolute, and there are times that the parental rights must yield to the welfare of the child. Maniaci instead claims that § 40-4-225, M.C.A., which gives a parent the right to access a child's medical records,

is absolute and may not be construed in light of the best interests of the child. Maniaci also asserts that to the extent there was a patient-client privilege between Silverman and the children, it was waived because notes has previously been provided to her by Silverman. Lastly, Maniaci claims that the absolute right to parent guarantees her access to the therapy notes, regardless of whether or not she intends to use the notes for her own self-interest in pursuing litigation and not for helping the children in therapy. She states unequivocally that the potential use of therapy notes in a custody proceeding is not a basis to deny access to the therapy notes. App. Brf at 19.

The uncompromising attitude of Maniaci in attempting to gain access to the therapy notes to serve her own self-interest rather than promote the well-being of her children should cause this Court readily to disregard her self-serving arguments. A parent is granted access to a child's medical records under § 40-4-225, M.C.A., not to serve the parent's own interests,

but to serve the child's. When the parent's interests and the child's interests diverge - when the parent is seeking the child's therapy notes to hold them against the other parent and not to benefit the child - then case law is clear that the child's interests and rights prevail. The District Court recognized this in upholding the child's right of privacy to maintain confidentiality of the notes in such cases, and in citing the many cases that support the protection of therapy a child's therapy records in child custody cases. D.C. Doc. 397 at 8.

Under Art. II, § 15, Mont. Const., the rights of a person under 18 years of age shall include, but not be limited to, "all the fundamental rights of this Article **unless specifically precluded by laws which enhance the protection of such persons.**" A parent may act for a child only to "enhance the protection" of the child. Children are not chattels who give up all rights to an all-powerful parent, especially when the parent is acting in a way that is harmful to the child. The

evidence at the hearing on July 9, 2009, was uncontroverted that the children were in need of effective therapy and that provisions of the therapy notes to Maniaci would deprive them of effective therapy by depriving them of a "safe place" where they could freely describe their feelings without fear of repercussions or consequences.

In general, minors have the same rights as others. Pengra v. State, 302 Mont. 276, 14 P.3d 499 (2000). Art. II, § 10, Mont. Const. vests in minor children, as in all individuals, the right of individual privacy, and such privacy may not be infringed without a compelling state interest. Reading sections 10 and 15 of Art. II together, a child's right of privacy can only be infringed when there is a compelling state interest to compromise that privacy interest or if the privacy infringement is directly related to the enhancement of the protection of the child. Here, there is neither a compelling state interest nor has there been any showing that the privacy infringement in

this case is related to the enhancement of the protection of the child. Indeed, the uncontroverted evidence shows release of the therapy notes serves only to harm the children by compromising the necessary therapy and then also by escalating animosity.

When parents are in a custody battle and access to therapy notes is not in the child's best interest, a parent's general right to medical records under § 40-4-225, M.C.A., must constitutionally give way to the child's constitutional right of privacy. The fact of the custody battle gives rise to a conflict of interest that places the interests of the child at odds with those of the parent.

Numerous cases from other states confirm that a parent may not seek therapy notes and may not waive the child's confidentiality privilege when the parent is acting under the parent's own self-interests in an adversarial pleading and not in the child's best interests. In Abrams v. Jones, 35 S.W.2d 620 (2000), the Texas Supreme Court denied a father access to the

psychotherapy notes of his daughter's psychologist. The Court recognized that under Texas law a parent has general access to the medical records of a child and even specific access to mental health records. But, in reversing the lower court, the Court reasoned that the father was not really acting on behalf of the child in requesting the otherwise confidential information. The Court noted that parents cannot always be deemed to be acting on the child's behalf, especially when parents are embroiled in a "suit affecting the parent/child relationship." The parent "may have motives of their own for seeking the mental health records of the child." 35 S.W.2d at 625-26.

Here, Maniaci's conflict of interest is apparent. The letter from Maniaci's counsel on January 8, 2009, shows how the information that was already obtained from Dr. Silverman was used by counsel to further her client's interests - and not the interests of the children. Ex. B, attached to D.C. Doc. 397. Counsel, in reviewing Dr. Silverman's notes, saw that Dr.

Silverman referenced a conversation with Kulstad, and counsel demanded to know when he spoke to Kulstad and "why is there no note of that conversation." This inquiry and other inquiries in the letter were made for the benefit of Maniaci's claim in the child custody dispute with Kulstad. In such cases, the District Court properly held in favor of the children's privacy interests in protecting the therapy notes.

The therapy notes are also protected pursuant to the privilege in § 26-1-807, M.C.A., which provides:

The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client. Nothing in any act of the legislature shall be construed to require such privileged communications to be disclosed.

The Florida Supreme Court has recognized that a child's statutory privilege of confidentiality of her communications with a psychotherapist cannot be waived by the parents. In Attorney ad Litem for D.K. v. Parents of D.K., 780 So. 2d 301 (Fla. 2001), a minor child successfully appealed the denial of a protective

order of her medical and mental health records. The Florida Court noted that a minor may invoke certain constitutional rights and privileges without her parents, and parents may not waive the psychotherapist/patient privilege when it did not appear they were acting solely on their daughter's behalf. 780 So.2d at 306. The Court quoted Nagle v. Hooks, 460 A.2d 49 (1983), where the Maryland Supreme Court stated:

Although arguably the parent who pursuant to court order has custody of a child could qualify as [a guardian under the statute], it is patent that such custodial parent has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure. We believe that it is inappropriate in a continuing custody "battle" for the custodial parent to control the assertion or waiver of the privilege of nondisclosure. In resolving custody disputes, we 'governed by what is in the best interest of the particular child and most conducive to his welfare..." D.K., 780 So. 2d at 306-07, quoting Nagles, 460 A.2d at 51-52.

Thus, when there is a custody battle, as we have here, neither parent is able to waive the privileged communications of the child. See also In re Berg, 886

A.2d 980 (N.H. 2005) (detailing G.A.L.'s proper role in asserting rights of minor children with respect to confidentiality of therapy notes); Hughes v. Schatzberg, 872 So. 2d 996 (Fla. 2004) (mother lacks standing to assert patient-psychotherapist privilege for nine-year old); Bond v. Bond, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) (father could not claim psychotherapist-patient privilege on behalf of child); and Sheiman v. Sheiman, 804 A.2d 983 (Conn. App. 2002) (child's counsel is proper party to assert child's privilege).

Maniaci contends that the patient-therapist privilege was waived because Dr. Silverman previously provided notes to Maniaci, citing Wigmore and cases construing Rule 503, M.R. Evid. Maniaci's argument and citations are irrelevant to her obtaining access to the therapy notes. Maniaci's arguments and cases go to the right to discover documents in litigation under rules of evidence. The evidentiary cases are irrelevant in

the context of attempting to get access to the child's therapy notes under her authority as a parent.

Lastly, the children's therapy notes are protected under HIPAA.<sup>5</sup> HIPAA regulation, 42 CFR § 164.524(a)(i), defines when an individual may have access to protected health information. It expressly states that an individual has a right of access to inspect and obtain a copy of protected health information about the individual **except for "psychotherapy notes."** Under this provision, neither the children themselves nor the parents as their personal representatives would have access to Dr. Silverman's notes and videos.

The HIPAA regulations also address the situation where a parent seeks information on a minor child. Under 45 CFR §164.502(g)(5)(i) and (ii) a covered entity need not treat a parent as a personal representative if the covered entity has the reasonable belief that treating the parent as the personal representative could endanger the individual and "the

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<sup>5</sup> Health Insurance Portability and Accountability Act of 1996, Pub. Law 104-191 (104<sup>th</sup> Congress)

covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative." Here, the uncontroverted evidence shows it is not in the children's best interests to provide Maniaci with the therapy notes and videos. Dr. Miller firmly recognized the need for the children to be able to communicate freely with their therapist and to have a safe place.

In summary, there are numerous sound legal bases for protecting the confidentiality of the children's therapy notes and only Maniaci's self-serving interests to support her having access to them.

## VII. CONCLUSION

For the foregoing reasons, Appellee, Michelle Kulstad, requests that the *Findings of Fact*, *Conclusions of Law and Order RE: Parenting* be affirmed.

DATED this 4<sup>th</sup> day of August, 2010.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately-spaced, Courier New typeface of 14 points; is double spaced; Microsoft Word for Windows; and is 7,988 words, excluding certificate of service and certificate of compliance.

DATED this 4<sup>th</sup> day of August, 2010.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing document was served upon opposing counsel of record by causing the same to be deposited in the U.S. Mail, postage prepaid, addressed as follows:

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